

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 07-098

LAWRENCE J. BASTIAN,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Joan E. Knight
AHD No. 03-406, OWC No. 579709

Benjamin Boscolo, Esquire, for the Petitioner

Douglas Datt, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, HENRY MCCOY¹, *Administrative Appeals Judges*, and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

¹ Administrative Law Judge McCoy is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Issuance No. 08-02 (September 30, 2008) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

OVERVIEW

This appeal follows the issuance of a Compensation Order on Remand from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on April 10, 2007, the Administrative Law Judge (ALJ) denied Petitioner's claim for schedule awards to both arms. Petitioner filed an Application for Review (AFR) on May 10, 2007 seeking review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ failed to accord him the benefit of the presumption that the claimed disability is causally related to Petitioner's work injury, and that in so doing the ALJ improperly rejected the opinion of his treating physician and accepted the opinion of Respondent's independent medical evaluating (IME) physician, contrary to law.

Respondent opposes the appeal, arguing that the ALJ exercised her discretion properly and reasonably, based upon the record evidence, which evidence supports the denial of the award, and which denial is in accordance with the law.

Because the acceptance of the IME physicians' opinions in preference to the opinion of the treating physician/chiropractor in the Compensation Order on Remand of April 10, 2007 is not supported by substantial evidence in the record when taken as a whole and is not in accordance with the law, in that the ALJ does not adequately address the contents of the deposition testimony of the treating physician/chiropractor, we reverse and vacate the Compensation Order on Remand. Because the matters presented must be resolved in accordance with the law and the record as a whole, we remand the matter for further consideration in light of the deposition of Dr. Winters.²

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review

² The ALJ in the first Compensation Order afforded Petitioner the benefit of the presumption and then deemed the presumption overcome by substantial evidence in opposition. That part of her analysis was not reversed in the first appeal, and it is evident from the record that the evidence is adequate to overcome that presumption in any event. Rather, what was reversed was the failure to consider the treating physician preference during the "weighing" process. Petitioner's appeal in this proceeding is therefore limited to that stage of the process, and the issue regarding Petitioner's entitlement to the benefit of the presumption is no longer an issue.

substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

It is well settled in this jurisdiction that under the District of Columbia Administrative Procedures Act (DCAPA), D.C. Code § 2-501 *et seq.* (2006), for each administrative decision in a contested case, (1) the agency's decision must state findings of fact on each material, contested factual issue, (2) those findings must be based on substantial evidence, and (3) the conclusions of law must follow rationally from the findings. *Perkins v. D.C. Department of Employment Services*, 482 A.2d 401, 402 (D.C. 1984); D.C. Official Code § 2-509. Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate body is not permitted to make its own finding on the issue; it must remand for the proper factual finding. *See Jimenez v. D.C. Department of Employment Services*, 701 A.2d 837, 838-840 (D.C. 1997). As the Court of Appeals explained in *King, supra*, 742 A.2d. at 465, basic findings of fact on all material issues are required, for “[o]nly then can this court determine upon review whether the agency’s findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.” *See also Sturgis v. D.C. Department of Employment Services*, 629 A. 2d 547 (D.C. 1993). The CRB is no less constrained in its review of compensation orders issued by AHD. *WMATA v. D.C. Department of Employment Services (Juni Browne, Intervenor)*, 926 A.2d 140 (D.C. 2007). *Accord, Hines v. Washington Metropolitan Area Transit Authority*, CRB No. 07-004, AHD No. 98-263D (December 22, 2006). The determination of whether an ALJ’s decision complies with the foregoing APA requirements is a determination that is necessarily limited in scope to the four corners of the compensation order under review. Accordingly, where an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more “fill the gap” by making its own findings from the record than can the Court of Appeals upon review of a final agency decision, but must remand the case to permit the ALJ to make the necessary findings. *See Mack v. D.C. Department of Employment Services*, 651 A.2d 804, 806 (D.C. 1994). So too, where the ALJ misapplies and/or misconstrues the governing law thereby warranting reversal of the compensation order under review, the CRB is constrained to remand the decision to the ALJ for a proper application of the law to the facts of the case. *See WMATA, supra*, 926 A.2d at 150.

With the foregoing principles of agency appellate review in mind, we turn to the issues raised by the present application for review.

In the Compensation Order on Remand under review at this time, the ALJ was tasked to reconsider the claim for a schedule disability award that had previously been denied by a prior ALJ who had resigned from the Agency while the first appeal was pending. The ALJ in that first Compensation Order found that Petitioner had adduced sufficient evidence to invoke the presumption that the claimed condition is causally related to the work injury, and that Respondent had produced sufficient evidence to overcome that presumption, but the ALJ ultimately determined that the evidence did not support a finding of such a causal relationship. The denial of the claim by that prior ALJ was based upon the ALJ having accepted the opinions of an IME evaluation in preference to the opinion of Petitioner’s treating physician (a chiropractor, who is included within the definition of “physician”, at D. C. Code § 32-1501 (17A), and is hence accorded that status for evidentiary preference purposes), without the prior ALJ having given an explanation detailing the reasons for accepting the IME opinion over that of the treating physician. Such an explanation is, of course, required in such cases, under long standing rules governing the preference for treating

physician opinion as a general principal in this jurisdiction. *See, Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992).

That prior ALJ's decision, that the Petitioner's current allegedly disabling condition is not causally related to the work injury, was appealed to the CRB, and the matter was remanded for further consideration in light of this preference and the requirements of such an explanation if on reconsideration the ALJ was determined to maintain the same position relative to the competing opinions presented. The remand order did not require that the matter be reconsidered *vis a vis* the presumption. Rather, the matter was remanded so that the evidence could be weighed, without regard to the presumption, but with Petitioner bearing the burden of proof by a preponderance of the evidence.

The new ALJ to whom the matter was reassigned issued a Compensation Order on Remand, again denying any award. After discussing certain cases involving the treating physician preference, including *Stewart, supra*, and *Mexicano v. District of Columbia Department of Employment Services*, 806 A.2d 198 (D.C. 2002), and citing *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986) for the principle that claimants are not entitled to any presumptions in connection with the assessment of the nature and extent of a claimed disability, but are rather required to establish entitlement to the claimed level of benefits by a preponderance of the evidence, the ALJ wrote:

Applying the standard set out in *Stewart* and *Mexicano* [,] *supra*, Dr. Winters [sic] [the treating chiropractor/physician] medical opinion is hereby rejected; I am persuaded Dr. Hinkes' medical opinion is more persuasive, comprehensive and indicates reasons for his medical conclusion which outweighs [sic] the medical opinion of the treating physician Dr. Winters in this case.

Based upon the record evidence, the claimant has failed to prove his current condition is causally related to the July 19, 2001 work injury to adequately support his claim for relief of a permanent impairment to both upper extremities.

Compensation Order on Remand, page 6. Without going into great detail, it is clear from the discussion leading up to this conclusion that the ALJ was convinced that Petitioner suffered from some significant medical impairments to his arms, but that she was of the view that those impairments are the result not of the work injury, but of pre-existing conditions from which Petitioner undoubtedly and admittedly suffered.

Regarding the assessment of competing medical opinion evidence, it is well established that, under the law of this jurisdiction, the opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. *See, Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992). The rule is not absolute, and where there are persuasive reasons to do so, IME opinion can be accepted over that of treating doctor opinion, with sketchiness, vagueness, and imprecision in the treating physician's

reports having been cited as legitimate grounds for their rejection, and personal examination by the IME physician, as well as review of pertinent medical records and diagnostic studies, and superior relevant professional credentialing as reasons to support acceptance of IME opinion instead of treating physician opinion. *Erickson v. Washington Metropolitan Area Transit Authority*, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997).

Additional reasons that have been found to be relevant to this determination are the fact that the IME physician had examined the claimant personally, had reviewed all the available medical reports and diagnostic studies, and had superior relevant professional experience and specialization. *Canlas v. District of Columbia Department of Employment Services*, 723 A.2d 1210 (D.C. App. 1999).

Petitioner asserts that the ALJ had inadequate justification for rejecting the treating physician/chiropractor's, Dr. Winters, opinion and accepting the opinion of the IME physician regarding the issue of causal relationship. Petitioner argues that the ALJ's characterization of the submitted medical notes reports by Dr. Winter as being "vague", or "lack[ing in] the necessary detail and specificity" is unsupported by the record, and complains that the ALJ characterized the attorney-drafted form filled in by Dr. Winters as being "unsupported by any record or testimony concerning a contemporaneous examination [and lacking] any explanation for its contents, rationale and conclusions [and being] couched in terms the meanings of which are not self-evident and are not explained".

While we would have no reason to second guess the ALJ's assessment of those medical notes and records were they the only evidence in the record from which Dr. Winters' views could be examined and considered, they are not. There is, as Petitioner points out, a deposition of the doctor, in which he gives explanations of his findings and addresses how he came to the impairment ratings contained in the attorney-drafted form. See for example, CE 1, Deposition of Dr. Winters, page 13 (discussing complaints related to an examination on July 20, 2001, the day after the date of the injury in this case, including "increased pain", and complaints that were in his view "definitely an aggravation" of his prior condition); page 20 (discussing the significance of an osteophyte, and particularly its potential role in neck pain aggravation by trauma, being greater than if no osteophyte was present); page 24 – 26 (characterizing the work injury as "an aggravation of the whole injury" resulting in "an increase in , you know, muscle spasm or pain" and a general increase in the frequency of Petitioner's pre-existing complaints following the work injury); page 29 (again comparing the pre-injury and post injury frequency of treatments as increasing from "once every month, once every two months" as opposed to coming in two or three times weekly since the work injury, as described on pages 24 – 26); page 32 (explaining the application of the A.M.A. Guides to his permanency evaluation and opinion; and page 34, asserting that Petitioner is "definitely decreased" in his physical capacities).

Thus, while it is true that a specific document referenced by the ALJ, CE 3, lacks the details that the ALJ reasonably expects to be available, the ALJ makes no reference to the specific contents of the deposition, which at least on its face appears to address the manner in which the impairment rating was assessed, and the basis of the opinion that the complaints represent an aggravation of the pre-existent condition. Whether the deposition testimony addresses this satisfactorily is not for us to judge. However, it appears from the Compensation Order on Remand that the ALJ's concerns about

lack of rationale, specificity and detail must at least take into account the contents of the deposition, in which the doctor attempts to explain those very matters.

While on remand the ALJ remains free to reject Dr. Winters' opinions if she remains un-persuaded by his explanation for specific articulable reasons, it is not a fair characterization of the record to state that it lacks "any explanation" for Dr. Winters' "rationale" for his medical conclusions. On remand the ALJ must consider not only the contents of the reports and notes, the characterization of as "vague", "imprecise", or "sketchy" being one with which we do not necessarily quarrel, but also the contents of Dr. Winters' deposition, so that the decision may fairly be said to be based "upon consideration of the record as a whole".

And, of course, if upon further consideration of the record as a whole the ALJ concludes that Petitioner has adduced a preponderance of evidence demonstrating that his current condition is in fact caused (including aggravated) by the work injury, the ALJ must then proceed to assess the nature and extent of disability, utilizing the *Dunston* standard and taking into account the treating physician preference rules.

CONCLUSION

The acceptance of the IME physicians' opinions in preference to the opinion of the treating physician/chiropractor in the Compensation Order on Remand of April 10, 2007 is not supported by substantial evidence in the record when taken as a whole and is not in accordance with the law, in that the ALJ does not adequately address the contents of the deposition testimony of the treating physician/chiropractor.

ORDER

The Compensation Order on Remand of April 10, 2007 is vacated, reversed and remanded for further consideration in light of the presumption of causal relationship and the contents of the record as a whole, including the contents of the deposition of Dr. Winters, in a manner consistent with foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

December 10, 2008
DATE